NO. 79-6673

IN THE SUPREME COURT OF THE UNITED STATES
_____Term, 1980

James Douglas Holt, Jr., Petitioner

vs.

United States of America, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

- - - - - - - - - - - - -

Pursuant to Rule 53 (1) of the Rules of this Court, Petitioner, James Douglas Holt, Jr., asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of cost and to proceed in Forma Pauperis. The Petitioner's Affidavit in support of this Motion is attached hereto.

Dated: May 27, 1980.

ROBERT D. MONFORT
Counsel for Petitioner
28 West Fifth Street
Covington, Kentucky 41011
(606) 491-1450

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IN THE SUPREME COURT OF THE UNITED STATES
_____Term, 1980

James Douglas Holt, Jr., Petitioner

vs.

United States of America, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

- - - - - - - - - - - - - -

I, James Douglas Holt, being first duly sworn according to law, depose and say that I am the Petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees states:

1. Because of my poverty, I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. My representation in this case, both at the trial and Appellate level, has been by appointed counsel.

4. I believe that I am entitled to the redress I seek in said cause.

5. This review is sought in good faith.

6. The nature of said cause is briefly states as follows: A decision by the United States Court of Appeals for the Sixth Circuit affirming my conviction in the United States Court for the Eastern District of Kentucky of one (1) count of conducting an illegal gambling business in violation of 18 USC 1955.

Further Affiant sayeth naught.

James Douglas Holt Jr.
JAMES DOUGLAS HOLT JR.

Subscribed and sworn to before me by James Douglas Holt, Jr., this 27th day of May, 1980.

Ron D. Monfort
Notary Public, Kentucky

Commission Expires:
11/14/81

Presented by:

Ron D. Monfort
ROBERT D. MONFORT
Attorney for Petitioner

RECEIVED
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SUPREME COURT, U.S.

NO. 79-6673

IN THE SUPREME COURT OF THE UNITED STATES
_____ Term, 1980

James Douglas Holt, Jr., Petitioner

vs.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

- - - - - - - - - - - - - - -

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 29, 1980, (Petition for rehearing not filed) affirming the criminal conviction of Petitioner by the United States District Court for the Eastern District of Kentucky of one (1) count of conducting an Illegal Gambling Business in violation of 18 USC 1955.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto.

JURISDICTION

Jurisdiction of this Court is based on 28 USC §1254 and Part V of the Rules of this Court. Petitioner is a party to a criminal action in which judgment was rendered in the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Eastern District of Kentucky.

## QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the Supreme Court should adopt a standard for determining whether expert testimoney profferred at trial was properly admitted or excluded pursuant to Rules 702 and 703 of the Federal Rules of Evidence.

## APPLICABLE STATUTES AND RULES

18 United States Code §1955
Kentucky Revised Statutes 523.010 et. seq.
Federal Rules of Evidence, Rule 702
Federal Rules of Evidence, Rule 703

## STATEMENT OF THE CASE

Defendant-Appellant and five other Defendants were named in an indictment returned January 10, 1979, charging them with gambling, a violation of 18 USC §1955. The indictment contained one count and charged that the offense occurred from or about August 1, 1977 up to October 25, 1977.

The trial of all Defendants except William Vandetti began May 15, 1979, and ended May 24, 1979, all Defendants being found guilty as charged. On May 31, 1979, Defendant Holt was sentenced to one year and one day. He timely filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On April 29, 1980, the Sixth Circuit Court of Appeals affirmed the conviction in an opinion dated April 19, 1980.

The Government's case was in regard to alleged gambling activities on the second floor of a building located at Ninth and Patterson, Newport, Kentucky, which housed the Quality Sales Company, a Kentucky corporation. Various Government witnesses

testified that they had seen and/or participated in poker and blackjack games on the premises. Various Government witnesses testifed that five individuals dealt blackjack or poker at one time or another. No witnesses testified that Defendants Herthel or Holt were directly involved in the gambling at any time, but a number of witnesses identifed Herthel as the bartender and Holt as the "doorman".

Additionally, the Government introduced various equipment seized pursuant to a search warrant, introduced testimony as to the number of automobiles parked near the premises, and called an expert witness, Agent R. Philip Harker. Agent Harker's testimony on direct examination consisted primarily of the rules, strategy, and odds in a typical blackjack game and the purpose and effect of cutting the pot in poker.

## ARGUMENT

### THE SUPREME COURT SHOULD ADOPT A STANDARD FOR DETERMINING WHETHER EXPERT TESTIMONY PROFERRED AT TRIAL WAS PROPERLY ADMITTED OR EXCLUDED PURSUANT TO RULES 702 AND 703 OF THE FEDERAL RULES OF EVIDENCE.

Because of the highly technical nature of many of the cases being presented to American Courts today, the use of expert witnesses has reached an unprecedented level. Several Federal Rules of Evidence, particularly Rules 702 and 703, have been drawn up to aid the trial judge in determining how, and to what extent, the expert may be used. So many appellate opinions have been written in recent years that inconsistencies have been unavoidable.

In spite of the greatly increased activity in the lower

courts on the issue, the Supreme Court has said little about the status and use of the expert witness in recent years. Mention was made of the use of experts to define "community standards" in several of the obscenity cases of the early 1970's, but the last direct pronouncement of this Court as to the proper use of experts was in the 1962 Civil Case of Salem v. United States Lines, 370 U.S. 31 8 L. Ed. 2d 313, 82 S. Ct. 119 (1962). The factual setting of the instant case and the departure from the established role of the expert provide an appropriate framework for this Court to make law as to the use of the expert under the Federal Rules.

Appellant herein raised and submitted to the Court of Appeals for the Sixth Circuit questions bearing upon three crucial issues regarding the use of experts: (1) the requisite facts on which the opinion is based; (2) the need for expert testimony; and (3) the probative value of the evidence in relation to its prejudicial effect. Each of these issues is of national significance, and should be addressed by this Court.

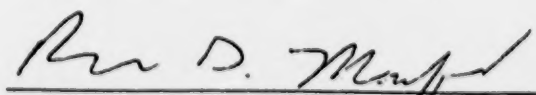
Of the three, the issues of when expert testimony may be used and what facts must be known to the expert should be of particular interest to this Court, as they relate directly to the Constitutional right of trial by jury. In this case an expert was permitted to testify at length as to how typical blackjack and poker games work. His testimony was based solely upon observation of various equipment found on the premises and conversations with Government witnesses. This testimony was

wholly unnecessary, as the Government also produced numerous witnesses who claimed to have observed how the actual games were played. Carried to its logical conclusion, this practice would permit the Government in each case to introduce testimony as to how a typical robbery or arson or whatever crime is committed. Surely this practice invades the province of the jury.

The third issue is that the prejudicial effect of the expert testimony outweighed its probative value, if any. Twice in the past three years, in United States v. Green, 548 F. 2d 1261 (6th Circuit 1977) and in United States v. Anderson, 584 F. 2d 849 ( 6th Circuit 1977), the Sixth Circuit has reversed convictions on that issue. In each of those cases, irrelevant expert testimony as to the effects of drugs was held to require reversal; in the instant case, irrelevant expert testimony that in the long run the player in a gambling game was a sure loser was not held to require reversal. A standard defining how far the expert may go in inflaming the passions of the jury against the Defendant is needed. The standard must apply to all crimes and all Federal Courts.

In conclusion, Federal Rules of Evidence 702 and 703 must be interpreted at the highest level. Lacking definitive guidance, the District Courts will apply these exceedingly important rules in a haphazard manner, with the inevitable result that some Defendants will be tried by experts rather than by jury.

Respectfully submitted,



ROBERT D. MONFORT
Attorney for Petitioner

NOS. 79-5190, 79-5191, 79-5200, 79-5201, 79-5251

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

1980

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

ORDER

JAMES DOUGLAS HOLT, JR.,
WILLIAM JAMES AHLBRAND,
RICHARD LEWIS HERTHEL,
CHARLES DAVID JOHNSON,
JOHN CLYDE AHLBRAND,

Defendants-Appellants.

BEFORE: ENGEL, BROWN and KENNEDY, Circuit Judges.

Appellants, James D. Holt, Jr., William James Ahlbrand, Richard Lewis Herthel, Charles David Johnson, and John Clyde Ahlbrand appeal from their convictions for conducting an illegal gambling business in violation of 18 U.S.C. § 1955. On appeal they raise the following issues: (1) whether the evidence was sufficient to sustain a conviction; (2) whether expert testimony regarding the usual manner in which gambling card games are played was improperly admitted; (3) whether the jurisdictional prerequisites of the statute were met, including whether the gambling business met the thirty-day substantially continuous requirement; (4) whether the activities of some defendants amounted to conducting a gambling business within the meaning of the statute; (5) whether the District Court definition of "conduct" in the jury instructions was improper; (6) whether

§ 1955 gives adequate warning as to what constitutes criminal conduct; (7) whether the District Judge erred in not giving a requested circumstantial evidence instruction; (8) whether the United States Attorney's closing rebuttal argument was inflammatory and improper; (9) whether the District Judge erred in not granting additional peremptory challenges; (10) whether the District Judge improperly failed to suppress evidence in the possession of the prosecutor pursuant to an inadequate search warrant; (11) whether the District Judge erred in not granting separate trials; and (12) whether the District Judge improperly failed to grant a mistrial as to one defendant when his attorney claimed an inability to cross-examine a witness fully as a result of information about the witness gained from an attorney-client relationship with that witness. Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, the Court concludes that the judgment rendered below and the decisions of the District Court on the issues raised were correct.

Accordingly, the judgment is affirmed.

ENTERED BY ORDER OF THE COURT

John A. Schumacher

Clerk

Eastern District of Kentucky
FILED

JAN 16 1979

AT LEXINGTON
DAVID T. McCARVEY
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

UNITED STATES OF AMERICA

VS: NO. 79-1-S
(Title 18, USC, Section 1955)

JOHN CLYDE AHLBRAND,
CHARLES DAVID JOHNSON,
WILBERT JOSEPH HESCH, JR.,
a/k/a BILLY HESCH,
WILLIAM JAMES AHLBRAND,
JAMES DOUGLAS HOLT, JR.,
RICHARD LEWIS HERTHEL,
a/k/a "BUTCH" HERTHEL, and
WILLIAM J. VANDETTI

THE GRAND JURY CHARGES:

That from on or about the 1st day of August 1977 and continuously thereafter up to and including the 25th day of October 1977, at Newport, in the Eastern District of Kentucky,

JOHN CLYDE AHLBRAND,
CHARLES DAVID JOHNSON,
WILBERT JOSEPH HESCH, JR.,
a/k/a BILLY HESCH,
WILLIAM JAMES AHLBRAND,
JAMES DOUGLAS HOLT, JR.,
RICHARD LEWIS HERTHEL,
a/k/a "BUTCH" HERTHEL, and
WILLIAM J. VANDETTI

unlawfully, wilfully, and knowingly did conduct, finance, manage, supervise, direct and own all and a part of an illegal gambling business located at The Quality Sales Company, Inc. building, Ninth and Patterson Streets, Newport, Kentucky; said illegal gambling business involving BlackJack, poker, various other card games, and craps, in violation of the laws of the Commonwealth of Kentucky, Kentucky Revsied Statute Chapter 528, in which state said gambling business was conducted; said illegal gambling business involved, during the period aforesaid, five and more than five persons and others whose identity to the Grand Jury is unknown who conducted, financed, managed, supervised, directed, and owned all and a part thereof; and said gambling business

remained in substantially continuous operation for a period in excess of thirty (30) days and had a gross revenue of $2,000 in any single day; in violation of Title 18, United States Code, Section 1955.

A TRUE BILL

S. Thomas Hoin
FOREMAN

PATRICK H. MOLLOY
UNITED STATES ATTORNEY

NM 5 yrs./$20,000/both